



MONDAY 12/1  
State of Wisconsin  
2003 - 2004 LEGISLATURE

LRB-2032/45  
DAK:kmg:pe

D-NOTE

## 2003 BILL

1 *Sen. Cat.*  
AN ACT *to repeal* 49.498 (20); *to renumber and amend* 50.04 (5) (a) 6.; *to*  
2 *amend* 50.04 (4) (b) 4., 50.04 (4) (e) 1., 50.04 (5) (title), 50.04 (5) (a) (intro.), 50.04  
3 (5) (a) 1., 2. and 3. (intro.), 50.04 (5) (a) 4., 50.04 (5) (a) 5. a., b. and d., 50.04 (5)  
4 (a) 5m., 50.04 (5) (b) (intro.), 50.04 (5) (c), 50.04 (5) (d) (title), 50.04 (5) (d) 1.,  
5 50.04 (5) (d) 2. (intro.), 50.04 (5) (dm) (intro.), 50.04 (5) (e), 50.04 (5) (f), 50.04  
6 (5) (fm), 50.04 (5) (fr), 50.04 (5) (g) and 50.04 (6) (a); and *to create* 20.435 (6)  
7 (ge), 50.04 (4) (am), 50.04 (5) (cm) and 50.15 of the statutes; **relating to:**  
8 regulation of nursing homes, requiring the exercise of rule-making authority,  
9 and making an appropriation.

### *Analysis by the Legislative Reference Bureau*

#### *Federal and state requirements for nursing homes*

Under current law, a nursing home that receives Medicaid or Medicare funding for the care of a resident is subject to both federal and state requirements. The Department of Health and Family Services (DHFS) enforces both federal and state requirements for nursing homes. Currently, for nursing homes that are Medicaid and Medicare providers, DHFS may impose both federal and state sanctions for the same deficiency. This bill prohibits ~~the state~~ from ~~finding that a deficiency at a~~

DHFS

**BILL**

*issuing a notice of violation of a state requirement to a nursing home that is a Medical Assistance provider is a violation of a state requirement if the deficiency also constitutes a violation of a federal requirement.*

**Appeals**

*DHFS has, in a statement of*  
Currently, in order to appeal a DHFS finding that the nursing home violated a state requirement, a nursing home must request a hearing on the finding within ten days of receiving notice of the violation. If DHFS assesses a forfeiture for the violation and the nursing home wishes to appeal the forfeiture, the nursing home must request a separate hearing on the forfeiture within ten days of receiving notice of ~~the forfeiture assessment~~. Upon request of the nursing home, the hearing on the finding of violation may be stayed until DHFS assesses a forfeiture so that the hearing on the finding of violation and the hearing on the forfeiture may be consolidated.

The bill extends the deadline for a nursing home to request a hearing on a finding that the nursing home violated a state requirement to 60 days after receipt of the notice of violation ~~or 30 days after notice of assessment of a forfeiture for the violation~~. The bill also extends the deadline for requesting a hearing on a forfeiture to 60 days after receipt of notice of the forfeiture. The bill further provides that, if a nursing home timely appeals both a finding of violation and a forfeiture, the hearings on the violation and the forfeiture will be consolidated.

**Monetary penalties**

Under current law, DHFS may assess a forfeiture against a nursing home for a violation of a state requirement. The maximum amount of the forfeiture varies according to the classification of the violation and ranges from \$500 to \$10,000. There is no time limit for DHFS to assess a forfeiture for a violation. Forfeitures collected for violations of state requirements are deposited in the school fund.

*120*  
The bill reduces the maximum forfeiture amounts permitted for violations of state requirements and requires that DHFS impose a penalty assessment on a nursing home whenever DHFS assesses a forfeiture for a violation of a state requirement. The bill further requires DHFS to impose a forfeiture and penalty assessment within ~~90~~ days of notifying a nursing home of a violation or lose the authority to impose a forfeiture and penalty assessment. The bill allocates moneys collected from the penalty assessments for nursing home quality-of-care improvement grants. Finally, the bill permits DHFS to enter into an agreement with a nursing home for the nursing home to spend a specified amount on quality improvement projects for the nursing home instead of paying a forfeiture and penalty assessment.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill. *and local*

*Fix component*  
**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

## BILL

20.435 (6) (ge) *Nursing home improvement grants*. All moneys received from penalty assessments imposed by the department under s. 50.04 (5), for nursing home improvement grants under s. 50.15.

SECTION 2. 49.498 (20) of the statutes is repealed.

SECTION 3. 50.04 (4) (am) of the statutes is created to read:

50.04 (4) (am) *Dual federal and state violations*. If an act or omission constitutes a violation of both this subchapter or the rules promulgated under this subchapter and s. 49.498 or 42 USC 1395i-3 (b), (c), or (d) or 1396r (b), (c), or (d), the department may not ~~make a determination that the act or omission is~~ a violation of this subchapter or the rules promulgated under this subchapter.

SECTION 4. 50.04 (4) (b) 4. of the statutes is amended to read:

50.04 (4) (b) 4. Each day of violation constitutes a separate violation. Except as provided in sub. (5) (a) 4., the department shall have the burden of showing that a violation existed on each day for which a forfeiture and penalty assessment is assessed imposed. No forfeiture or penalty assessment may be assessed imposed for a condition for which the nursing home has received a variance or waiver of a standard.

SECTION 5. 50.04 (4) (e) 1. of the statutes is amended to read:

50.04 (4) (e) 1. If a nursing home desires to contest any department action under this subsection, it shall send a written request for a hearing under s. 227.44 to the division of hearings and appeals created under s. 15.103 (1) within ~~40~~ 60 days of receipt of notice of the contested action or within 60 days of receipt of notice of a forfeiture and penalty assessment imposed under sub. (5) (c) in connection with the contested action. Department action that is subject to a hearing under this subsection includes service of a notice of a violation of this subchapter or rules

issue under  
s. 50.04 (4)  
(a)✓

notice of

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**BILL**

1 promulgated under this subchapter, a notation in the report under sub. (3) (b),  
2 imposition of a plan of correction, and rejection of a nursing home's plan of correction,  
3 but does not include a correction order. Upon the request of the nursing home, the  
4 division shall grant a stay of the hearing under this paragraph until the department  
5 assesses a forfeiture, so that its hearing under this paragraph is consolidated with  
6 the forfeiture appeal hearing held under sub. (5) (e). All agency action under this  
7 subsection arising out of a violation, deficiency, or rejection and imposition of a plan  
8 of correction shall be the subject of a single hearing. Unless a stay is granted under  
9 this paragraph, the division shall commence the hearing within 30 days of the  
10 request for hearing, within 30 days of the department's acceptance of a nursing  
11 home's plan of correction, or within 30 days of the department's imposition of a plan  
12 of correction, whichever is later. The division shall send notice to the nursing home  
13 in conformance with s. 227.44. Issues litigated at the hearing may not be relitigated  
14 at subsequent hearings under this paragraph arising out of the same violation or  
15 deficiency.

16 **SECTION 6.** 50.04 (5) (title) of the statutes is amended to read:

17 50.04 (5) (title) FORFEITURES AND PENALTY ASSESSMENTS.

18 **SECTION 7.** 50.04 (5) (a) (intro.) of the statutes is amended to read:

19 50.04 (5) (a) *Amounts.* (intro.) Any operator or owner of a nursing home ~~which~~  
20 that is in violation of this subchapter or any rule promulgated thereunder under this  
21 subchapter may be subject to the forfeitures specified in this section. If the  
22 department imposes a forfeiture under this subsection, the department shall also  
23 impose a penalty assessment under this subsection.

24 **SECTION 8.** 50.04 (5) (a) 1., 2. and 3. (intro.) of the statutes are amended to read:

**BILL**

1           50.04 (5) (a) 1. A class “A” violation may be subject to a forfeiture of not more  
2           than \$250 and a penalty assessment of not more than \$10,000 for each violation.

3           2. A class “B” violation may be subject to a forfeiture of not more than \$125 and  
4           a penalty assessment of not more than \$5,000 for each violation.

5           3. (intro.) A class “C” violation may be subject to a forfeiture of not more than  
6           \$60 and a penalty assessment of not more than \$500. No forfeiture or penalty  
7           assessment may be assessed imposed for a class “C” violation unless at least one of  
8           the following applies:

9           **SECTION 9.** 50.04 (5) (a) 4. of the statutes is amended to read:

10          50.04 (5) (a) 4. Notwithstanding subds. 1., 2. and 3., if the violation or group  
11          of violations results from inadequate staffing, the combined amount of the forfeiture  
12          and penalty assessment that the department may assess impose shall be no less than  
13          the difference between the cost of the staff actually employed and the estimated cost  
14          of the staff required. The number of staff required shall be determined by the  
15          provider contract, the court order, or the department, by rule, whichever is greatest.  
16          The inadequate staff shall be presumed to exist from the date of the notice of  
17          violation.

18          **SECTION 10.** 50.04 (5) (a) 5. a., b. and d. of the statutes are amended to read:

19          50.04 (5) (a) 5. a. A nursing home that violates a statute or rule resulting in a  
20          class “A” violation and that has received a notice of violation for a class “A” “A”  
21          violation within the previous 3-year period involving the same situation shall be  
22          subject to a forfeiture 3 times the forfeiture amount authorized for a class “A”  
23          violation and a penalty assessment 3 times the penalty assessment amount  
24          authorized for a class “A” violation.

**BILL**

1           b. Except as provided in subd. 5. a., a nursing home that violates a statute or  
2 rule resulting in a class “A” or class “B” violation and that has received a notice of a  
3 class “A” or class “B” violation of the same statute or rule within the previous 3-year  
4 period may be subject to a forfeiture 3 times the forfeiture amount authorized for the  
5 most recent class of violation involved and a penalty assessment 3 times the penalty  
6 assessment amount authorized for the most recent class of violation involved.

7           d. The forfeiture ~~amount~~ and penalty assessment amounts that is are tripled  
8 under this subdivision shall be the ~~amount assessed~~ forfeiture and penalty  
9 assessment amounts imposed after all appeals have been exhausted. If an  
10 assessment imposition of a forfeiture and penalty assessment is not contested and  
11 the forfeiture is and penalty assessment are paid as provided in par. (fm), the  
12 forfeiture ~~amount~~ and penalty assessment amounts that is are tripled is are the  
13 ~~amount assessed~~ amounts imposed after the reduction specified in par. (fm).

14           **SECTION 11.** 50.04 (5) (a) 5m. of the statutes is amended to read:

15           50.04 (5) (a) 5m. ~~Beginning on December 8, 1987, the~~ The department may  
16 consider, for purposes of applying triple forfeitures and penalty assessments under  
17 subd. 5., any notice of violation issued by the department ~~within the 2-year period~~  
18 ~~preceding December 8, 1987, or issued by the department on or after December 8,~~  
19 ~~1987~~ after December 7, 1985.

20           **SECTION 12.** 50.04 (5) (a) 6. of the statutes is renumbered 50.04 (5) (a) 6. (intro.)  
21 and amended to read:

22           50.04 (5) (a) 6. (intro.) If a licensee fails to correct a violation within the time  
23 specified in the notice of violation or approved plan of correction, or within the  
24 extended correction time granted under sub. (4) (c) 4., or if a violation continues after

**BILL**

1 a report of correction, the department may assess upon the licensee ~~a- for each day~~  
2 of the continuing violation whichever of the following is applicable:

3 a. A separate forfeiture of not more than \$10,000 \$250 and a separate penalty  
4 assessment of not more than \$10,000 for a class "A" violations, and may assess a  
5 violation.

6 b. A separate forfeiture of not more than \$5,000 \$125 and a separate penalty  
7 assessment of not more than \$5,000 for a class "B" violations, for each day of  
8 continuing violation.

9 **SECTION 13.** 50.04 (5) (b) (intro.) of the statutes is amended to read:

10 50.04 (5) (b) *Factors in assessment imposition of forfeitures and penalty*  
11 *assessments.* (intro.) In determining whether to impose a forfeiture is to be imposed  
12 and penalty assessment for a violation and in fixing the ~~amount~~ amounts of the  
13 ~~forfeiture to be imposed and penalty assessment~~, if any, ~~for a violation~~, the following  
14 factors shall be considered:

15 **SECTION 14.** 50.04 (5) (c) of the statutes is amended to read:

16 50.04 (5) (c) *Assessment Imposition of forfeitures and penalty assessments;*  
17 *powers and duties of department.* The department may directly assess impose  
18 forfeitures and penalty assessments provided for under par. (a). If the department  
19 determines that a forfeiture and penalty assessment should be assessed imposed for  
20 a particular violation or for failure to correct it, ~~it~~ the department shall send a notice  
21 of assessment imposition of forfeiture and penalty assessment to the nursing home.  
22 The notice shall specify the ~~amount~~ amounts of the forfeiture assessed and penalty  
23 assessment imposed, the violation, and the statute or rule alleged to have been  
24 violated, and shall inform the licensee of the right to hearing under par. (e). If the  
25 department does not issue a notice of forfeiture and penalty assessment within 90

120

## BILL

## SECTION 14

*on which*  
*after the date that a nursing home receives the notice*

① days of a violation, ~~it~~ may not impose a forfeiture or penalty assessment for the  
2 violation. *→ the department*

3 SECTION 15. 50.04 (5) (cm) of the statutes is created to read:

4 50.04 (5) (cm) ~~Quality-of-care improvement agreements.~~ If, after the  
5 department imposes a forfeiture and penalty assessment under par. (c), the  
6 department and a nursing home agree that instead of paying the forfeiture and  
7 penalty assessment the nursing home shall spend a specified amount on specified  
8 measures to improve the quality of care for nursing home residents, the department  
9 shall vacate the forfeiture and penalty assessment imposed under par. (c). The  
10 department may extend the time for paying a forfeiture and penalty assessment  
11 under par. (f) to negotiate an agreement under this paragraph.

12 SECTION 16. 50.04 (5) (d) (title) of the statutes is amended to read:

13 50.04 (5) (d) (title) *Forfeiture and penalty assessment period.*

14 SECTION 17. 50.04 (5) (d) 1. of the statutes is amended to read:

15 50.04 (5) (d) 1. In the case of a class "B" violation, no forfeiture or penalty  
16 assessment may be assessed imposed for the violation from the day following the  
17 date of discovery until the date of notification. If the department fails to approve or  
18 reject a plan of correction within 15 days after its receipt of a complete plan, no  
19 forfeiture or penalty assessment may be imposed for the period beginning with the  
20 15th day after receipt and ending when notice of approval or rejection is received by  
21 the home. If a plan of correction is approved and carried out, no forfeiture or penalty  
22 assessment may be assessed imposed during the time period specified in the  
23 approved plan of correction, commencing on the day the plan of correction is received  
24 by the department.

25 SECTION 18. 50.04 (5) (d) 2. (intro.) of the statutes is amended to read:



# BILL

50.04 (5) (d) 2. (intro.) In the case of a class “C” violation for which a notice of violation has been served, a forfeiture and penalty assessment may be assessed imposed for whichever of the following periods is applicable:

**SECTION 19.** 50.04 (5) (dm) (intro.) of the statutes is amended to read:

50.04 (5) (dm) (intro.) Forfeiture and penalty assessment imposition date. In the case of a class “B” violation, the department may not assess impose a forfeiture or a penalty assessment upon a nursing home until: the imposition of the

**SECTION 20.** 50.04 (5) (e) of the statutes is amended to read:

50.04 (5) (e) *Forfeiture and penalty assessment appeal hearing.* A nursing home may contest an assessment imposition of a forfeiture and penalty assessment by sending, within ~~10~~ 60 days after receipt of notice of ~~a contested action~~, a written request for hearing under s. 227.44 to the division of hearings and appeals created under s. 15.103 (1). The administrator of the division may designate a hearing examiner to preside over the case and recommend a decision to the administrator under s. 227.46. The decision of the administrator of the division shall be the final administrative decision. The division shall commence the hearing within 30 days of receipt of the request for hearing and shall issue a final decision within 15 days after the close of the hearing. Proceedings before the division are governed by ch. 227. In any petition for judicial review of a decision by the division, the party, other than the petitioner, who was in the proceeding before the division shall be the named respondent. If, after receipt of notice of imposition of a forfeiture and penalty assessment, a nursing home timely requests a hearing under sub. (4) (e) on the contested action under sub. (4) for which the forfeiture and penalty assessment were imposed, and requests a hearing under this paragraph on the imposition of the forfeiture and penalty assessment, the hearing on the contested action under sub.

## BILL

(4) and the hearing on the imposition of the forfeiture and penalty assessment shall be consolidated.

SECTION 21. 50.04 (5) (f) of the statutes, as affected by 2003 Wisconsin Act 33, is amended to read:

50.04 (5) (f) *Forfeitures and penalty assessments paid within 60 days.* All forfeitures and penalty assessments shall be paid to the department within 60 days of receipt of notice of assessment imposition of the forfeiture and penalty assessment or, if the forfeiture or penalty assessment is contested under par. (e), within 60 days of receipt of the final decision after exhaustion of administrative review, unless the final decision is appealed and the order is stayed by court order under s. 50.03 (11). The department shall remit all forfeitures paid to the secretary of administration for deposit in the school fund. All moneys collected as penalty assessments under this subsection shall be credited to the appropriation account under s. 20.435 (6) (ge).

SECTION 22. 50.04 (5) (fm) of the statutes is amended to read:

50.04 (5) (fm) *Forfeiture and penalty assessment reduction for timely payment.*  
If a nursing home does not contest a notice of violation under sub. (4) (e) and does not contest an assessment imposition of a forfeiture and penalty assessment under par. (e) for a class "A" or class "B" violation and pays the forfeiture and penalty assessment to the department within 10 days after receipt of the notice of assessment imposition of the forfeiture and penalty assessment, the department shall reduce the amount of the assessment forfeiture and penalty assessment by 35 percent.

SECTION 23. 50.04 (5) (fr) of the statutes is amended to read:

50.04 (5) (fr) *Report to the legislature.* Annually, the department shall submit a report to the legislature under s. 13.172 (2) that specifies for the previous year the number of class "A" violations, the amount amounts of the forfeiture assessment and

**BILL**

1 penalty assessment imposed for each of those violations and, if known, the amount  
2 amounts of the forfeiture and penalty assessment actually paid and collected with  
3 respect to those violations. The report shall also include an explanation for any  
4 ~~assessment that was~~ imposition of a forfeiture and penalty assessment that totaled  
5 less than \$2,500 for the violations specified in the report.

6 **SECTION 24.** 50.04 (5) (g) of the statutes is amended to read:

7 50.04 (5) (g) *Enforcement by attorney general.* The attorney general may bring  
8 an action in the name of the state to collect any forfeiture or penalty assessment  
9 imposed under this section if the forfeiture or penalty assessment has not been paid  
10 following the exhaustion of all administrative and judicial reviews. The only issue  
11 to be contested in any such action shall be whether the forfeiture or penalty  
12 assessment has been paid.

13 **SECTION 25.** 50.04 (6) (a) of the statutes is amended to read:

14 ~~50.04 (6) (a) *Power of department.* In addition to the right to assess impose~~  
15 ~~forfeitures and penalty assessments under sub. (5), the department may issue a~~  
16 ~~conditional license to any nursing home if the department finds that either a class~~  
17 ~~"A" or a class "B" violation, as defined in sub. (4), continues to exist in such home.~~  
18 ~~The issuance of a conditional license shall revoke any outstanding license held by the~~  
19 ~~nursing home. The nursing home may seek review of a decision to issue a conditional~~  
20 ~~license as provided under s. 50.03 (5).~~

✓  
INSERT  
11-20

21 **SECTION 26.** 50.15 of the statutes is created to read:

22 **50.15 Nursing home improvement grants.** From the appropriation  
23 account under s. 20.435 (6) (ge), the department shall make grants to nursing homes  
24 to fund quality-of-care improvement projects. The department shall promulgate

**BILL**

1 rules that specify the eligibility criteria and application procedures for receipt of a  
2 grant under this section.

**SECTION 27. Nonstatutory provisions.**

4 (1) NURSING HOME IMPROVEMENT GRANTS. The department of health and family  
5 services shall submit in proposed form the rules required under section 50.15 of the  
6 statutes, as created by this act, to the legislative council staff under section 227.15  
7 (1) of the statutes no later than the first day of the 13<sup>th</sup> month beginning after the  
8 effective date of this subsection.

**SECTION 28. Initial applicability.**

10 (1) HEARING REQUESTS. The treatment of section 50.04 (4) (e) 1. and (5) (e) of the  
11 statutes first applies to requests for hearings related to a notice of violation, a report  
12 notation, a plan correction, or a rejection of a plan correction that is issued on the  
13 effective date of this subsection.

14 INSERT 12-13 ✓

(END)

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2003-2004 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

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**INSERT A1** ✓

*No 9* Nursing homes must pay forfeitures to DHFS within ten days after receipt of notice of imposition of the forfeiture or after receipt of the final decision after exhaustion of administrative review. If a nursing home does not contest a notice of violation and a forfeiture and pays the forfeiture within ten days after receipt of the notice, DHFS must reduce the forfeiture amount by 35 percent.

**INSERT A2** ✓

*No 9* The bill changes to 60 days the time period by which nursing home must pay forfeitures and penalty assessments to DHFS after receipt of the notice of imposition or the final decision after exhaustion of administrative review, and also changes to 60 days the time period within which a nursing home may pay a forfeiture and penalty assessment and have the forfeiture and penalty assessment amounts reduced by 35 percent.

**INSERT A3** ✓

***Conditional licenses***

Currently, in addition to the right to impose a forfeiture on a nursing home for violations, DHFS may issue a conditional license to a nursing home in which DHFS finds that a class "A" or a class "B" violation continues to exist in the nursing home. (A class "A" violation creates a condition or occurrence relating to the operation and maintenance of a nursing home that presents a substantial probability that death or serious mental or physical harm to a nursing home resident will result. A class "B" violation creates a condition or occurrence relating to the operation and maintenance of a nursing home that directly threatens the health, safety, or welfare of a nursing home resident.) Issuing a conditional license revokes any outstanding license held by the nursing home.

This bill expands the standard for issuance by DHFS of a conditional license for a nursing home to also include a violation that constitutes immediate jeopardy, high risk of death or substantial harm, or direct threat or actual harm (as defined in the bill) to a nursing home resident.

***Suspension of admissions***

Under current law, DHFS must suspend new admissions to a nursing home if the nursing home received notices of violation for a class "A" violation or three or more class "B" violations in the previous 12 months; and if the nursing home received notices of violation for a class "A" violation or three or more class "B" violations in any 12-month period during the three years immediately preceding the previous 12 months. Suspension of admissions begins 90 days after a nursing home received its last notice of violation for a class "A" or class "B" violation if DHFS determines that the violation is uncorrected or on the day that DHFS makes a return visit to the nursing home and determines that the violation has not been corrected. *S*

This bill expands the standard for suspension of new admissions to a nursing home to include circumstances under which a nursing home received written notice of a violation that involved immediate jeopardy or high risk of death or substantial

on which  
harm to a resident in the previous 12 months and in any 12-month period immediately preceding the previous 12 months. The bill clarifies that a suspension of admissions begins on the date ~~that~~ DHFS determines that a nursing home's violation remains uncorrected 90 days after the nursing home has received written notice of the violation and remains in effect until the nursing home has corrected the violation.

***Suspension or revocation of licensure***

Currently, DHFS may, after providing notice to a nursing home applicant or licensee, suspend or revoke the license if DHFS finds that the nursing home substantially failed to comply with applicable state statutes or rules. No state or federal funds passing through the state treasury may be paid to a nursing home that does not have a valid license. This bill also permits DHFS to suspend or revoke a nursing home license if the nursing home has substantially failed to comply with specified federal law and modifies the restriction on payment of federal or state funds in instances in which other state or federal law compels payment.

✓ **INSERT 3-4** ✓

1       **SECTION 1.** 50.01 (1k) of the statutes is created to read:

2       50.01 (1k) "Direct threat or actual harm" means a condition or occurrence  
3 relating to nursing home operation and maintenance that has caused injury, harm,  
4 or impairment to a resident or that directly threatens the health, safety, or welfare  
5 of a resident.

6       **SECTION 2.** 50.01 (1nd) of the statutes is created to read:

7       50.01 (1nd) "High risk of death or substantial harm" means a condition or  
8 occurrence relating to nursing home operation and maintenance that presents a  
9 substantial probability of the death or serious mental or physical injury, harm, or  
10 impairment of a resident.

11       **SECTION 3.** 50.01 (1ng) of the statutes is created to read:

12       50.01 (1ng) "Immediate jeopardy" means a situation in which a resident of a  
13 nursing home is experiencing or is at imminent risk of experiencing death or  
14 substantial harm.

1           **SECTION 4.** 50.03 (5) (a) of the statutes is amended to read:

2           50.03 (5) (a) *Power of department.* The department, after notice to a nursing  
3       home applicant or licensee, may suspend or revoke a license in any case in which the  
4       department finds that the nursing home has substantially failed to comply with the  
5       applicable requirements of this subchapter and the rules promulgated under this  
6       subchapter <sup>or</sup> (with s. 49.498 or 42 USC 1395i-3 (b), (c), or (d) or 1396r (b), (c), or (d)). <sup>Score</sup>  
7       ~~No~~ Unless otherwise required by state or federal law, no state or federal funds  
8       passing through the state treasury may be paid to a nursing home that does not have  
9       a valid license issued under this section.

**History:** 1975 c. 413; 1977 c. 29, 170, 205, 272, 418, 447; 1979 c. 221; 1981 c. 20, 72, 121; 1981 c. 314 s. 146; 1985 a. 29 ss. 1058, 3202 (56) (a); 1985 a. 176; 1985 a. 182 s. 57; 1985 a. 332 s. 251 (1), (3); 1987 a. 27, 127, 399; 1989 a. 31, 359; 1991 a. 39, 221; 1993 a. 27, 112, 375, 491; 1995 a. 27 ss. 3227 to 3232, 9126 (19); 1997 a. 27, 114; 2001 a. 16; 2003 a. 33.

**INSERT 3-10** ✓

10       <sup>Not</sup> if the department has, in a statement of deficiency, cited the nursing home for  
11       the violation under s. 49.498 or 42 USC 1395i-3 (b), (c), or (d) or 1396r (b), (c), or (d)

**INSERT 3-17** ✓

12           **SECTION 5.** 50.04 (4) (d) 1. a. of the statutes is repealed and recreated to read:

13           50.04 (4) (d) 1. a. In the previous 12 months, the nursing home received written  
14       notice of a violation of a state statute or rule or a federal statute or regulation that  
15       involved either immediate jeopardy or high risk of death or substantial harm to a  
16       resident; a ~~Class~~ "A" violation; or 3 or more ~~Class~~ "B" violations or situations that  
17       constituted a direct threat or actual harm.

18           **SECTION 6.** 50.04 (4) (d) 1. b. of the statutes is repealed and recreated to read:

19           50.04 (4) (d) 1. b. In any 12-month period during the 36 months immediately  
20       preceding the period specified in subd. 1. a., the nursing home received written notice  
21       of a violation of a state statute or rule or a federal statute or regulation that involved  
22       either immediate jeopardy or high risk of death or substantial harm to a resident or

1 a ~~Class~~ "A" violation; or 2 or more ~~Class~~ "B" violations or situations that constituted ✓  
2 a direct threat or actual harm.

3 **SECTION 7.** 50.04 (4) (d) 2. of the statutes is amended to read:

4 50.04 (4) (d) 2. A suspension of admissions under subd. 1. shall begin 90 days  
5 ~~after a nursing home received its last notice of violation for a class "A" or class "B"~~  
6 ~~violation if the department determines that the violation remains uncorrected 90~~  
7 ~~days after the nursing home received the last notice of the violation.~~ If the nursing  
8 home indicates to the department that the violation has been corrected, but the  
9 department is unable to verify that the violation has been corrected, a suspension of  
10 admissions under subd. 1. shall begin on the day that the department makes a return  
11 visit to the nursing home and determines that the violation has not been corrected  
12 on the date <sup>on which</sup> that the department determines that a nursing home's violation under  
13 subd. 1. remains uncorrected 90 days after the nursing home received written notice  
14 of the violation. A suspension of admissions under subd. 1. shall remain in effect  
15 until the department determines that all class "A" and class "B" violations by the  
16 ~~nursing home have been corrected~~ the nursing home has corrected the violation.  
17 Admission of a new resident during the period for which admissions have been  
18 suspended constitutes a class "B" violation.

History: 1977 c. 170 ss. 6, 29; 1977 c. 272; 1979 c. 34; 1981 c. 20, 121, 317, 391; 1983 a. 27 s. 2200 (1); 1985 a. 29; 1985 a. 182 s. 57; 1985 a. 332 s. 251 (1), (7); 1987 a. 27, 127, 399; 1989 a. 31, 336; 1991 a. 39, 269, 315; 1995 a. 27; 1997 a. 27, 114, 237, 252, 280; 1999 a. 9, 32, 103; 2003 a. 33.

**INSERT 11-20** ✓

19 **SECTION 8.** 50.04 (6) (a) of the statutes is repealed and recreated to read:

20 50.04 (6) (a) *Power of department.* 1. In addition to the right to impose ✓  
21 forfeitures and penalty assessments under sub. (5), the department may issue a  
22 conditional license to any nursing home if the department finds that any of the  
23 following is true:



1 a. A class "A" or class "B" violation, as defined in sub. (4), continues to exist in  
2 the nursing home.

3 b. A violation continues to exist that constitutes immediate jeopardy, high risk  
4 of death or substantial harm, or direct threat or actual harm to a resident.

5 2. The issuance of a conditional license shall revoke any outstanding license  
6 held by the nursing home.

7 3. The nursing home may seek review of a decision to issue a conditional license  
8 as provided ~~under~~<sup>in</sup> s. 50.03 (5). ✓

**INSERT 12-13**

9 (2) ~~CONDITIONAL LICENSURE~~<sup>#</sup>. The treatment of section ~~50.04~~<sup>5</sup> (6) (a) of the statutes  
10 first applies to violations committed on the effective date of this subsection.

11 (3) ~~SUSPENSION OF ADMISSIONS~~<sup>#</sup>. The treatment of sections 50.01 (1k), (1nd), and  
12 (1ng) and 50.04 (4) (d) 1. a. and b. and ~~(d) 2.~~<sup>12</sup> of the statutes first applies to violations  
13 committed on the effective date of this subsection.

14 (4) ~~SUSPENSION OR REVOCATION OF LICENSURE~~<sup>#</sup>. The treatment of section 50.03 (5)  
15 (a) of the statutes first applies to violations committed on the effective date of this  
16 subsection.  
17

50.01 (1k), (1nd),  
and (1ng) and

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2032/5dn  
DAK&RLR:kmg:pg



To Representative Pettis:

1. Note that in s. 50.03 (5) (a), stats., I referred to specific federal law, rather than "federal certification laws related to the operation of a residential or health care facility in this state." Neither "residential facility" nor "health care facility" is defined in Wisconsin statutes and unless that is done I think it is clearer to refer to the specific citations to the federal law.

2. In s. 50.04 (4) (d) 1. b., I changed "3 years" to 36 months; in s. 990.01 (49), stats., "year" is defined for use throughout the statutes as a calendar year, and I assumed that you wanted to avoid that interpretation. Note also that in s. 50.04 (4) (d) 1. b. I drafted two or more rather than three or more, Class "B" violations or situations that constituted a direct threat or actual harm; the DHFS language gave either as an option, but indicated that two would be consistent with the federal "double G" concept; the DHFS language did not elaborate on what a "double G" concept is, however.

3. The DHFS proposed language to amend s. 50.04 (4) (d) 2., stats., refers to a "violation ... that formed the basis for departmental action under subd. 1." Section 50.04 (4) (d) 1. is the standard for suspensions; DHFS is precluded from acting until the time period in s. 50.04 (4) (d) 2. is satisfied; I removed the language "that formed the basis for action by the department under subd. 1." Also, it was unclear from the instructions whether it was intended that the last sentence of s. 50.04 (4) (d) 2., stats., remain or be repealed. I retained it.

4. Section 50.04 (5) (a) 5m., stats., has, in the past, served as a type of initial applicability provision. When enacted, it served as a two-year reachback for consideration in imposing initial triple forfeitures under s. 50.04 (5) (a) 5. In examining the file for this draft, I note that this subdivision was amended, under LRB-2032/1, to add penalty assessments to the triple forfeitures. In LRB-2032/2, it was amended to permit DHFS to consider, for purposes of applying triple forfeitures and penalty assessments, any notice of violation issued by DHFS after December 7, 1985. Do you intend that consideration of past violations reach back that far? It seems now to be in direct conflict with the three-year consideration under s. 50.04 (5) (a) 5., stats. I recommend that the provision be repealed and that a nonstatutory initial applicability provision be created that applies consideration of the triple forfeitures and penalty assessments under s. 50.04 (5) (a) 5., stats., to class "A" violations by nursing homes

that received notices of violations for class "A" violations within 36 months [or less, depending on your choice] before the act's effective date. I also recommend that this initial applicability provision exempt from the new forfeiture and penalty assessment amounts a nursing home that has already had triple forfeitures imposed within the 36 months [or whatever period you choose above], so that you do not create a retroactive enhanced penalty that could be an ex post facto law in violation of Article 1, Section 10, of the U.S. Constitution and Article 1, Section 12<sup>y</sup> of the Wisconsin Constitution (a statute defining or creating or enhancing a penalty may not be applied retroactively).

5. This redraft changes the term "contested action" in the first sentence of s. 50.04 (5) (e), stats. Is "contested action" now the appropriate term in the last sentence?

6. It was unclear whether you intended that the last two sentences of s. 50.04 (6) (a), stats., remain or be repealed. I retained them.

Please let me know if I may assist you further with this bill.

Debora A. Kennedy  
Managing Attorney  
Phone: (608) 266-0137  
E-mail: debora.kennedy@legis.state.wi.us

7. Please note that I also added an initial applicability provision for the changed standards for issuance of conditional licenses under s. 50.04 (6) (a), suspension of admissions under ss. 50.01 (1k), (1nd), and (1ng) and 50.04 (4) (d) 1. <sup>a.</sup> and <sup>b.</sup> (b) and (d) 2., and suspension or revocation of licensure under section 50.03 (5) (a). Please review.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2032/5dn  
DAK:kmg:pg

December 1, 2003

To Representative Pettis:

1. Note that in s. 50.03 (5) (a), stats., I referred to specific federal law, rather than "federal certification laws related to the operation of a residential or health care facility in this state." Neither "residential facility" nor "health care facility" is defined in Wisconsin statutes and unless that is done I think it is clearer to refer to the specific citations to the federal law.
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that received notices of class "A" violations within 36 months [or less, depending on your choice] before the act's effective date. I also recommend that this initial applicability provision exempt from the new forfeiture and penalty assessment amounts a nursing home that has already had triple forfeitures imposed within the 36 months [or whatever period you choose above], so that you do not create a retroactive enhanced penalty that could be an ex post facto law in violation of Article 1, Section 10, of the U.S. Constitution and Article 1, Section 12, of the Wisconsin Constitution (a statute defining or creating or enhancing a penalty may not be applied retroactively).

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7. Please note that I also added an initial applicability provision for the changed standards for issuance of conditional licenses under s. 50.04 (6) (a), suspension of admissions under ss. 50.01 (1k), (1nd), and (1ng) and 50.04 (4) (d) 1. a. and b. and (d) 2., and suspension or revocation of licensure under section 50.03 (5) (a). Please review.

Please let me know if I may assist you further with this bill.

Debora A. Kennedy  
Managing Attorney  
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E-mail: debora.kennedy@legis.state.wi.us

12/03/03 Rep. Pettis, Brian Rustell, Deane Walsh, Linda Dawson

- ✓ ① p. 6, line 3 + 10 - Brian:  
Add 3 <sup>or more</sup> violations involving high risk of  
death or substantial harm

~~A = H + above~~  
~~B = G + below~~ } on grid

H-L = A (mixed jeep.)

G-A = B

(Sometimes H could drop to a B)

Brian: As is, is okay

- ✓ ② p. 6, l. 11 - Brian wants "3" rather than "2"  
class "B" violations

p. 6, l. 7 - change 12 to 15

p. 6, l. 1 - " " "

- ③ p. 6 ll 15-21 See Linda Dawson

- ✓ ④ p. 12 + 13, ll 22-2 see draft 2

p. 12, l. 23: insert "that is" after "home" +  
change "requests" to "requested" + change "contested  
action" to "notice of violation"

p. 13, l. 1 - change "contested action" to "notice  
of violation"

✓ ⑤ p. 4, l. 5 - delete that line

✓ ⑥ ~~Add footnote -~~ LD p. 5  
P3 50.03 (5) (a) + 50.04 (4) (am) -  
See DN # 1 - use "nh"

✓ ⑦ p. 5, l. 6 - Delete "unless ... no"

⑧ Linda wants penalty assessment to be 70  
of amt. of forfeiture  
DHFS with null over

⑨ Linika + DHFS can only determine fit + qualified  
Linda: at time of licensure - wants to  
look over life of license + revoke  
if necessary  
(132.14 (4), WAC)  
[mirrors what in CBRF stat.]

✓ ⑩ Repeal 50.04 (5) (a) 5m.

SCOPE	ISOLATED	PATTERN	WIDESPREAD
	<i>(One or a very limited number of residents affected and/or one or a very limited number of staff involved, and/or the situation occurred only occasionally or in a very limited number of locations.)</i>	<i>(More than a limited number of residents affected, and/or more than a limited number of staff involved, and/or the situation occurred in several locations and/or the same resident(s) have been affected by repeated occurrences of the same practice.)</i>	<i>(Situation was pervasive throughout the facility or represented a systemic failure that affected or had the potential to affect a large portion or all of the facility's residents.)</i>
<b>SEVERITY/HARM</b>			
<b>(4) Immediate jeopardy to resident health or safety</b>  <i>(Deficient practice caused or is likely to cause serious injury, serious harm, serious impairment or death AND there is a reasonable degree of predictability of a similar situation occurring in the future. Immediate corrective action is needed.)</i>	J	K	L
<b>(3) Actual harm that is not immediate jeopardy</b>  <i>(Deficient practice led to a negative outcome that has compromised the resident's ability to maintain and/or reach his/her highest practicable physical, mental, and/or psychosocial well-being...)</i>	G	H	I
<b>(2) No actual harm with potential for more than minimal harm that is not immediate jeopardy</b>  <i>(Deficient practice has led to minimal physical, mental, and/or psychosocial discomfort to the resident and/or a yet unrealized potential for compromising the resident's ability to maintain and/or reach his/her highest practicable level of physical, mental, and/or psychosocial well-being...)</i>	D	E	F
<b>(1) No actual harm with potential for no more than minimal harm</b>  <i>(Deficient practice has the potential for causing no more than minor negative impact on residents.)</i>	<b>SUBSTANTIAL COMPLIANCE</b>  A	<b>SUBSTANTIAL COMPLIANCE</b>  B	<b>SUBSTANTIAL COMPLIANCE</b>  C

**SHADED AREAS** = SUBSTANDARD QUALITY OF CARE for any deficiency in s. 483.13 Resident Behavior and Facility Practices (F221-F225), s. 483.15, Quality of Life (F240-F258), and s. 483.25 Quality of Care (F309-F333).

\*\*\* If the examples under one tag are at different levels of harm, choose the HIGHEST harm level and the scope associated with that particular level of harm.





# Health Bulletin

A Supplement to Washington Report

American Association of Homes and Services for the Aging  
901 E Street NW, Suite 500, Washington, DC 20004-2037 • (202)783-2242 • FAX (202)783-2255

January 23, 1995

## Nursing Facility Enforcement: Selection of Remedies

This *Health Bulletin* is one of a series designed to prepare AAHSA members for the changes to be implemented by the nursing facility survey, certification and enforcement final regulation July 1.

In an earlier *Health Bulletin* (Nov. 23, 1994), we had noted that in order to give guidance to survey agencies on selection of remedies to be applied for various deficiencies, HCFA has developed three categories of remedies linked to the degree of noncompliance. HCFA has organized the remedies from least to most severe, and has specified the deficiencies to which they should apply.

### Enforcement Remedies

The remedies available for nursing facility enforcement are:

- Directed plan of correction\*
- Directed inservice training\*
- Denial of payment for new admissions
- Denial of payment for all individuals
- State monitoring
- Civil money penalties
- Temporary management
- Termination
- Closure in emergency situations and/or transfer.

\* These sanctions were created by HCFA; all others were specified in OBRA 1987.

### Severity and Scope

All deficiencies will be classified through the use of severity and scope, according to the following scales:

#### Severity

- Immediate jeopardy to resident health or safety
- Actual harm that is not immediate jeopardy
- No actual harm with potential for more than minimal harm that is not immediate jeopardy
- No actual harm with potential for minimal harm.

#### Scope

- Isolated
- Pattern
- Widespread.

### Factors in Selecting Remedies

In addition to severity and scope, other factors to be considered in choosing a remedy include but are not limited to: (1) the relationship of one deficiency to other deficiencies resulting in noncompliance and (2) the facility's prior history of noncompliance in general and specifically regarding the cited deficiencies.

### Categories of Remedies

Remedies described above are grouped into categories and applied to remedies according to how serious the noncompliance is.

#### Category 1 Remedies

- Directed plan of correction
- State monitoring
- Directed inservice training.

These remedies are applied when: (1) there are isolated deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy or (2) there is a pattern of deficiencies that constitutes no actual harm with a potential for more than minimal harm but not immediate jeopardy.

#### Category 2 Remedies

- Denial of payment for new admissions
- Denial of payment for all individuals imposed only by HCFA
- Civil money penalties of \$50 to \$3,000 per day.

These remedies are applied when: (1) there are widespread deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy or (2) there are one or more deficiencies that constitute actual harm that is not immediate jeopardy.

### Category 3 Remedies

- Temporary management
- Immediate termination
- Civil money penalties of \$3,050 to \$10,000 per day.

When there are one or more deficiencies that constitute immediate jeopardy to resident health or safety, HCFA or the state must impose temporary management or terminate the provider agreement, and also may impose Category 3 level fines. When there are widespread deficiencies that constitute actual harm that is not im-

mediate jeopardy, HCFA or the State may impose temporary management, in addition to other Category 2 remedies. A nursing facility must submit a plan of correction for each deficiency, except for isolated deficiencies that constitute no actual harm with a potential for minimal harm.

*The application of categories of remedies to various types of deficiencies is illustrated with the chart below. The chart provides plans of corrections (POC) based on the scope and severity of the deficiency.*

## Categories of Remedies To Be Applied to Deficiencies

	ISOLATED	PATTERN	WIDESPREAD
IMMEDIATE JEOPARDY TO RESIDENT HEALTH OR SAFETY	<b>PoC</b> Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	<b>PoC</b> Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	<b>PoC</b> Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2
ACTUAL HARM THAT IS NOT IMMEDIATE JEOPARDY	<b>PoC</b> Required: Cat. 2 Optional: Cat. 1	<b>PoC</b> Required: Cat. 2 Optional: Cat. 1	<b>PoC</b> Required: Cat. 2 Optional: Cat. 1 Optional: Temporary Mgmt.
NO ACTUAL HARM WITH POTENTIAL FOR MORE THAN MINIMAL HARM THAT IS NOT IMMEDIATE JEOPARDY	<b>PoC</b> Required: Cat. 1 Optional: Cat. 2	<b>PoC</b> Required: Cat. 1 Optional: Cat. 2	<b>PoC</b> Required: Cat. 2 Optional: Cat. 1
NO ACTUAL HARM WITH POTENTIAL FOR MINIMAL HARM	No PoC No Remedies Commitment to Correct Not on HCFA-2567	<b>PoC</b>	<b>PoC</b>

Substandard quality of care: any deficiency in §483.13 Resident Behavior and Facility Practices, §483.15 Quality of Life, or §483.25 Quality of Care that constitutes: immediate jeopardy to resident health or safety; or a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.

Substantial compliance: a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

## Available Remedies

- ☐ Temporary Management §488.415
- ☐ Civil Money Penalties (CMPs) §488.430 - 488.444
- ☐ Denial of Payment for New Admissions §488.417
- ☐ Secretarial authority to deny all payments §488.418
- ☐ State Monitoring §488.422
- ☐ Directed Plan of Correction §488.424
- ☐ Directed In-service Training §488.425
- ☐ Closure of a facility or transfer of residents, or both §488.426
- ☐ Termination of Provider Agreement §488.456

## Notice/Disclosure Requirements

### Disclosure:

- ☐ Survey information may be disclosed to the public 14 calendar days after such information is made available to the facility. §488.325 (a)
  - ☐ The State MUST disclose certain information to the State's long-term care ombudsman. §488.325(f)
  - ☐ Substandard quality of care - The State must notify the State board for licensing nursing home administrators and the attending physician of residents. §488.325(h)
- Notice:
- ☐ 15 days — non-immediate jeopardy for all remedies, except CMPs. §488.402(f)
  - ☐ 2 days — immediate jeopardy for all remedies, except CMPs. §488.402(f)

Immediate Jeopardy to Resident Health or Safety

Actual Harm that is not Immediate Jeopardy

No Actual Harm with Potential for More than Minimal Harm that is not Immediate Jeopardy

No Actual Harm with Potential for Minimal Harm

Substandard quality of care: any deficiency in §483.13 Resident Behavior and Facility Practices, §483.15 Quality of Life, or in §483.25, Quality of Care that constitutes immediate jeopardy to resident health or safety; or, a pattern of or widespread actual harm that is not immediate jeopardy; or, a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.

Substantial compliance

Category 1 (Cat. 1)  
Directed Plan of Correction  
State Monitor; and/or  
Directed In-service Training

### Remedy Categories

Category 2 (Cat. 2)  
Denial of Payment for New Admissions;  
Denial of Payment for All Individuals, Imposed by HCFA;  
\* and/or Civil Money Penalties: \$50 - \$3,000 per day

Category 3 (Cat. 3)  
Temporary Management Termination  
Optional:  
\* Civil Money Penalties: \$3,050 - \$10,000 per day

DENIAL OF PAYMENT FOR NEW ADMISSIONS must be imposed when a facility is not in substantial compliance within three months after being found out of compliance.

DENIAL OF PAYMENT AND STATE MONITORING must be imposed when a facility has been found to have provided substandard quality of care on three consecutive standard surveys.

*Note: Termination may be imposed by the State or HCFA at any time when appropriate.*

*\* Required only when decision is made to impose alternate remedies instead of or in addition to termination.*

PoC	PoC	PoC
Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	Required: Cat. 3 Optional: Cat. 1 Optional: Cat. 2	Required: Cat. 3 Optional: Cat. 2 Optional: Cat. 1
PoC	PoC	PoC
Required* Cat. 2 Optional: Cat. 1	Required* Cat. 2 Optional: Cat. 1	Required* Cat. 2 Optional: Cat. 1 Optional: Temporary Mgmt.
PoC	PoC	PoC
Required* Cat. 1 Optional: Cat. 2	Required* Cat. 1 Optional: Cat. 2	Required* Cat. 2 Optional: Cat. 1
No Remedies Commitment to Correct Not on HCFA-2567	PoC	PoC

### Isolated

### Pattern

### Widespread

## ISOLATED

## PATTERN

## WIDESPREAD

IMMEDIATE JEOPARDY TO RESIDENT HEALTH OR SAFETY	<p>Plan of Correction Required: Category 3 Temporary Management Termination *Optional: Civil Money Penalties (\$3,050 - \$10,000/day)</p> <p>Optional: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p> <p>Optional: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p>	<p>Plan of Correction Required: Category 3 Temporary Management Termination *Optional: Civil Money Penalties (\$3,050 - \$10,000/day)</p> <p>Optional: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p> <p>Optional: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p>	<p>Plan of Correction Required: Category 3 Temporary Management Termination *Optional: Civil Money Penalties (\$3,050 - \$10,000/day)</p> <p>Optional: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p> <p>Optional: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p>
ACTUAL HARM THAT IS NOT IMMEDIATE JEOPARDY	<p>Plan of Correction *Required: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p> <p>Optional: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p>	<p>Plan of Correction *Required: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p> <p>Optional: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p>	<p>Plan of Correction *Required: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p> <p>Optional: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p> <p>Optional: Temporary Management</p>
NO ACTUAL HARM WITH POTENTIAL FOR MORE THAN MINIMAL HARM THAT IS NOT IMMEDIATE JEOPARDY	<p>Plan of Correction *Required: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p> <p>Optional: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p>	<p>Plan of Correction *Required: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p> <p>Optional: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p>	<p>Plan of Correction *Required: Category 2 Denial of Payment for New Admissions Denial of Payment for All Individuals (imposed by HCFA) and/or *Civil Money Penalties (\$50 - \$3,000/day)</p> <p>Optional: Category 1 Directed Plan of Correction State Monitor and/or Directed In-Service Training</p>
NO ACTUAL HARM WITH POTENTIAL FOR MINIMAL HARM	<p>No Plan of Correction</p> <p>No Remedial Commitment to Correct</p> <p>Does not go on HCFA 2567, goes into Separate form</p>	<p>Plan of Correction</p>	<p>Plan of Correction</p>

\*Required only when decision is made to impose alternative remedies instead of or in addition to termination.



**Substandard Quality of Care:** Any deficiency in s. 483.13 Resident Behavior and Facility Practices, s. 483.15 Quality of Life, or s. 483.25 Quality of Care, that constitutes immediate jeopardy to resident health or safety; or a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.



**Substantial Compliance**

Denial of Payment for New Admissions must be imposed when a facility is not in substantial compliance within 3 months after being found out of compliance.

Denial of Payment and State Monitoring must be imposed when a facility has been found to have provided Substandard Quality of Care on 3 consecutive standard surveys.

include the same information required by HCFA in paragraph (f)(1) of this section.

(3) *Immediate jeopardy—2 day notice.* Except for civil money penalties and State monitoring imposed when there is immediate jeopardy, for all remedies specified in § 488.406 imposed when there is immediate jeopardy, the notice must be given at least 2 calendar days before the effective date of the enforcement action.

(4) *No immediate jeopardy—15 day notice.* Except for civil money penalties and State monitoring, notice must be given at least 15 calendar days before the effective date of the enforcement action in situations in which there is no immediate jeopardy.

(5) *Latest date of enforcement action.* The 2 and 15-day notice periods begin when the facility receives the notice, but, in no event will the effective date of the enforcement action be later than 20 calendar days after the notice is sent.

(6) *Civil money penalties.* For civil money penalties, the notices must be given in accordance with the provisions of §§ 488.434 and 488.440.

(7) *State monitoring—immediate jeopardy.* For State monitoring imposed when there is immediate jeopardy, no prior notice is required.

#### § 488.404 Factors to be considered in selecting remedies.

(a) *Initial assessment.* In order to select the appropriate remedy, if any, to apply to a facility with deficiencies, HCFA and the State determine the seriousness of the deficiencies.

(b) *Determining seriousness of deficiencies.* To determine the seriousness of the deficiency, HCFA considers and the State must consider at least the following factors:

(1) Whether a facility's deficiencies constitute—

- (i) No actual harm with a potential for minimal harm;
- (ii) No actual harm with a potential for more than minimal harm, but not immediate jeopardy;
- (iii) Actual harm that is not immediate jeopardy; or
- (iv) Immediate jeopardy to resident health or safety.

(2) Whether the deficiencies—

- (i) Are isolated;
- (ii) Constitute a pattern; or
- (iii) Are widespread.

(c) *Other factors which may be considered in choosing a remedy within a remedy category.* Following the initial assessment, HCFA and the State may consider other factors, which may include, but are not limited to the following:

(1) The relationship of the one deficiency to other deficiencies resulting in noncompliance.

(2) The facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

#### 7-19 Remedies

#### § 488.406 Available remedies.

(a) *General.* In addition to the remedy of termination of the provider agreement, the following remedies are available:

- (1) Temporary management;
- (2) Denial of payment including—

(i) Denial of payment for all individuals, imposed by HCFA, to a—

(A) Skilled nursing facility, for Medicare;

(B) State, for Medicaid; or

(ii) Denial of payment for all new admissions;

(3) Civil money penalties;

(4) State monitoring;

(5) Closure of the facility by the State in emergency situations or transfer of residents, or both;

(6) Directed plan of correction;

(7) Directed in-service training; and

(8) Alternative or additional State remedies approved by HCFA.

(b) *Remedies that must be established.*

At a minimum, the State must establish the following remedies or approved alternatives to the following remedies:

(1) Termination of the provider agreement.

(2) Temporary management.

(3) Denial of payment for new admissions.

(4) Civil money penalties.

(5) Closure of the facility in emergency situations or transfer of residents, or both.

(6) State monitoring.

(c) *State plan requirement.* If a State wishes to use remedies for noncompliance that are either additional or alternative to those specified in paragraphs (a) or (b) of this section, it must—

(1) Specify those remedies in the State plan; and

(2) Demonstrate to HCFA's satisfaction that those remedies are as effective as the remedies listed in paragraph (a) of this section, for deterring noncompliance and correcting deficiencies.

(d) *State remedies in dually participating facilities.* If the State's remedy is unique to the State plan and has been approved by HCFA, then that remedy, as imposed by the State under its Medicaid authority, may be imposed by HCFA against the Medicare provider agreement of a dually participating facility.

#### § 488.408 Selection of remedies.

(a) *Categories of remedies.* In this section, the remedies specified in § 488.406(a) are grouped into categories and applied to deficiencies according to how serious the noncompliance is.

(b) *Application of remedies.* After considering the factors specified in § 488.404, as applicable, if HCFA and the State choose to impose remedies, as provided in paragraphs (c)(1), (d)(1) and (e)(1) of this section, for facility noncompliance, instead of, or in addition to, termination of the provider agreement, HCFA does and the State must follow the criteria set forth in paragraphs (c)(2), (d)(2), and (e)(2) of this section, as applicable.

(c) *Category 1.* (1) Category 1 remedies include the following:

(i) Directed plan of correction.

(ii) State monitoring.

(iii) Directed in-service training.

(2) HCFA or the State must apply one or more of the remedies in Category 1 when there—

(i) Are isolated deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy; or

(ii) Is a pattern of deficiencies that constitutes no actual harm with a potential for more than minimal harm but not immediate jeopardy.

(3) Except when the facility is in substantial compliance, HCFA or the State may apply one or more of the remedies in Category 1 to any deficiency.

(d) *Category 2.* (1) Category 2 remedies include the following:

(i) Denial of payment for new admissions.

(ii) Denial of payment for all individuals imposed only by HCFA.

(iii) Civil money penalties of \$50–3,000 per day.

(2) HCFA applies one or more of the remedies in Category 2, or, except for denial of payment for all individuals, the State must apply one or more of the remedies in Category 2 when there are—

(i) Widespread deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy; or

(ii) One or more deficiencies that constitute actual harm that is not immediate jeopardy.

(3) Except when the facility is in substantial compliance, HCFA or the State may apply one or more of the remedies in Category 2 to any deficiency.

(e) *Category 3.* (1) Category 3 remedies include the following:

(i) Temporary management.

(ii) Immediate termination.

(iii) Civil money penalties of \$3,050–\$10,000 per day.

## Kennedy, Debora

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**From:** Brian Purtell [brian@whca.com]  
**Sent:** Friday, January 09, 2004 3:35 PM  
**To:** kimberly.ried@legis.state.wi.us  
**Cc:** Dawson, Linda  
**Subject:** LRB 2032/5



LRB 2032\_5 final  
revision2.doc...

Kimber: Attached is the document that contains the agreed upon changes between the providers and the DHFS. Please contact me if you have any questions.

## Kennedy, Debora

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**From:** Liedl, Kimberly  
**Sent:** Monday, January 12, 2004 9:47 AM  
**To:** Kennedy, Debora  
**Subject:** Nursing home bill



LRB 2032/5

Hi, Debra, I'm just getting back to you on that lovely nursing home bill, which we discussed last week. I have close to the final changes from Brian - the only thing left is his change regarding the direct threat (which he talks about in the email below), though we could always do that as an amendment.

Originally, we were shooting for a hearing this Thursday on this bill, but that would mean we would have to have the draft by the end of the day today. Is that even a possibility? If not, then we will have the hearing in February. You've been a real trooper with this bill - the changes have been frustrating for all of us. So, if you could check out the changes that are attached, that would be great. If there's not a possibility of having a draft by the end of the day, that's life and we'll go with Plan B. I just wanted to check with you to see what you think.

Thanks,  
Kimber

-----Original Message-----

**From:** Brian Purtell [mailto:brian@whca.com]  
**Sent:** Monday, January 12, 2004 7:49 AM  
**To:** kimberly.Liedl@legis.state.wi.us  
**Subject:** Fw: Undeliverable: LRB 2032/5

found the problem why it didn't arrive Fri. Misspelled address. As I thought over the weekend, I think we need to add a definition of "direct threat" so as to avoid the DHFS being able to label anything as such. I will work on language this a.m.

Brian R. Purtell  
Director of Legal Services  
Wisconsin Health Care Association  
(608) 257-0125  
brian@whca.com

Received from Rep. Pettis' office 1/12/04

Subject: LRB 2032/5

**Proposed changes to LRB 2032/5**

**(1) Analysis by the LRB.**

- ✓ a. Page 2, lines 1-2. Replace existing language with and add the following: "... and Medicare providers, DHFS may issue both federal and state citations for the same deficient practice and can recommend federal remedies and impose state sanctions."
- ✓ b. Page 2, line 3. Add the following: "Medical Assistance or Medicare provider"
- ✓ c. Page 2, line 5. Add the following: "requirement based on the same facts."
- ✓ d. Page 3, last sentence. Strike the last part of sentence as follows: "This bill also permits DHFS to suspend or revoke a nursing home license if the nursing home has substantially failed to comply with specified federal law and modifies ... compels payment."

✓ (2) **Section 2, page 4, line 5.** Retain sec. 49.498(20), Stats.

(3) **Section 6, page 5.**

- a. Lines 5-6. Delete the reference to specific federal regulations and replace with the following: "subchapter, with s. 49.498, or federal requirements related to the operation of a nursing home in this state."
- ✓ b. Lines 6-8. Strike the following language: "Unless otherwise required by federal law," and retain the rest of the sentence as written.

✓ (4) **Section 7, page 5.**

- a. Line 12. Delete the reference to specific federal regulations and replace with the following: "subchapter, s. 49.498, or federal requirements related to the operation of a nursing home in this state."
- b. Line 13-14. "a notice of violation of this subchapter, ~~or~~ the rules promulgated under this subchapter, or s. 49.498 if the department..."
- ✓ c. Lines 15-16. Delete the reference to specific federal regulations and replace with the following: "under s. 49.498, or federal requirements related to the operation of a nursing home in this state."

(5) **Section 9, page 6.**

- ✓ a. Line 1. Replace "12" with "15" months.
- b. Lines 3-5. Replace to read: "involved either immediate jeopardy or a high risk of death or substantial harm; a class "A" violation; or 3 or more class "B" violations or situations that constituted actual harm that is not immediate jeopardy, or directly threatens the health safety or welfare of a resident."

(6) **Section 10, page 6.**

- ✓ a. Line 7. Replace "12" with "15" months.
- ✓ b. Lines 10-12. Revise with: "either immediate jeopardy or a high risk of death or substantial harm; a class "A" violation; or 23 or more class "B" violations or situations that constituted actual harm that is not immediate jeopardy, or directly threatens the health safety or welfare of a resident."

✓ (7) **Section 11, page 6, lines 14-24.** Replace with the following: "A suspension of admissions under subd. 1. shall begin 90 days after a nursing home received its

I AK  
check  
these  
changes  
& avoid  
as a  
whole.

This does not  
work; what is  
function of "both"  
?  
? This also does  
not work -  
second 49.498

Fixed:  
deleted  
"both"

Fixed:  
deleted  
49.498

Fixed:  
see  
notes

??  
jeopardy

See (5)  
above



No; makes sentence too long.

last notice of violation for a class "A" or class "B" violation if the department determines that the violation remains uncorrected 90 days after the nursing home received the last notice of the violation ~~or if~~ the nursing home earlier indicates to the department that the violation has been corrected, a suspension of admissions under subd.1. shall begin on the day that the department makes a return visit to the nursing home and determines that the violation has not been corrected."

✓(8) **Section 12, page 7, lines 14 and 15.** Add "and penalty assessment" following "forfeiture" in both lines.

✓(9) **Section 18, pages 9 and 10.** Sec. 50.04(5)(a)5m. should be repealed; it is no longer needed.

✓(10) **Section 19, page 10.**

✓a. **Lines 11-13:** Replace to read: "A separate forfeiture of ~~not more than~~ \$250 and a separate penalty assessment of not more than \$10,000..."

✓b. **Lines 14-16:** Replace to read: "A separate forfeiture of ~~not more than~~ \$125 and a separate penalty assessment of not more than \$5000..."

?  
No; this doesn't work - don't want to elim. factors for imposing forfeiture

(10.5) **Section 20, page 10, lines 18-22:** Replace to read: "~~Factors in imposition of forfeitures and penalty assessments.~~ (intro.) In determining whether to impose a forfeiture and penalty assessment for a violation and in fixing the amounts of the forfeiture and penalty assessment, if any, the following factors shall be considered:"

Fixed:  
eliminated  
2nd  
"forfeiture"  
only

✓(11) **Section 26, page 12, lines 21-25 and page 13, lines 1-2.** Replace the underscored sentence with the following sentence: "If, after receipt of notice of imposition of a forfeiture and penalty assessment, a nursing home that has timely requested a hearing under sub. (4)(e) on the notice of violation under sub. (4) for which the forfeiture and penalty assessment were imposed requests a hearing under this paragraph on the imposition of the forfeiture and penalty assessment, the hearing on the notice of violation under sub. (4) and the hearing on the imposition of the forfeiture and penalty assessment shall be consolidated."

check -  
is my  
wording  
correct?

✓(12) **Section 31, page 14, lines 23-24.** Replace to read "b. A federal violation continues to exist that constitutes immediate jeopardy, high risk of death or substantial harm, actual harm that is not immediate jeopardy, or directly threatens the health safety or welfare of a resident."

Fixed

✓(13) **Section 34, page 16.**

✓a. **Lines 1-3:** Amend the sentence as follows: "The treatment of sections 50.01(1k), (1nd), and (1ng) and 50.04(4)(d)1.a. and b and (d)2. of the statutes first applies to written notices of violations received on the effective date of this subsection."

✓b. **Lines 4-6:** Amend the sentence as follows: "The treatment of section 50.03(5)(a) of the statutes first applies to findings made by the department on the effective date of this subsection."

1/21/04 From Brian Purtell: (Redraft of -2032/5)

① In s. 50.04(4)(am) - agreed to delete "both" and the reference to s. 49.478 on p. 5, l. 15

② In s. 50.04(5)(b) (intro.) agreed that factors for imposition of a forfeiture should not be struck through.

③ Said would provide def. of ~~direct threat~~ "immed. jeopardy"

**Kennedy, Debora**

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**From:** Brian Purtell [brian@whca.com]  
**Sent:** Wednesday, January 21, 2004 1:27 PM  
**To:** debora.kennedy@legis.state.wi.us  
**Subject:** IJ definition

*federal* **"Immediate Jeopardy:** means situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." (See 42 CFR Part 489.3.)

*related to the op of a nhr*

Brian R. Purtell  
Director of Legal Services  
Wisconsin Health Care Association  
(608) 257-0125  
[brian@whca.com](mailto:brian@whca.com)

01/21/2004

1/22 From Linda Dawson

- ① Definition: Should be "directly threatened":  
created a condit. or occurrence relating to wh  
op + maint that cd. lead to injury or  
impairment to a resident or harm to  
the health, safety, or welfare of a resid.
- ② She agreed to my changes to 50.04 (4)(am) +  
(5)(b) (intro.)
- ③ She modified B. Purcell's def of "uninjd. property"  
slightly
- ④ Worked out a grammatical standard for  
50.04 (4)(d) 1. a. and b. (Problem: their  
def indicated actual harm that did not  
directly threaten a resident  
(see attached))  
  
Fit with def. of "directly threatened"

Their proposal reads: "... that involved either immediate jeopardy or a high risk of death or substantial harm; a class "A" violation; or 30 or more class "B" violations or situations that constituted actual harm that is not immediate jeopardy, or directly threatens the health safety or welfare of a resident"

My proposal: that <sup>constituted</sup> ~~constituted~~ <sup>actual</sup> actual harm that did not immediately jeopardize <sup>to a res.</sup> or directly threaten <sup>that</sup> the health, safety, or welfare of a res.

(Q:) How can actual harm not directly threaten? Are these two things (that constituted ① actual harm ② a direct threat) [The current language is very similar] Or - is it actual harm that does not immediately threaten directly ... ?

What to do w/ definition?

**Kennedy, Debora**

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**From:** Dawson, Linda  
**Sent:** Monday, January 26, 2004 2:14 PM  
**To:** [legis.state.wi.us]; kimberly.liedl  
**Cc:** Kennedy, Debora; [whca.com]; brian  
**Subject:** LRB 2032 - "Direct Threat" language

This is what we've agreed to:

"Directly threatened" means [that the violation] "created a condition or occurrence relating to nursing home operation and maintenance that could reasonably be expected to lead to injury or impairment of a resident or harm to the health, safety or welfare of a resident."

LD

\* \* \* \* \*

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